

EXHIBIT A

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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 JAMES J. GRUNDY,

10
11 Plaintiff,

12 vs.

13 BANK OF AMERICA, N.A. et al.,

14 Defendants.

CASE NO. 12-CV-561- IEG (DHB)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

[Doc. No. 8]

15
16 Before the Court is Defendants' motion to dismiss pursuant to Federal Rule of Civil
17 Procedure 12(b)(6). [Doc. No. 8.] For the reasons specified below, Defendants' motion is
18 **GRANTED.**

19 **BACKGROUND**

20 On March 6, 2012, Plaintiff James J. Grundy, proceeding *pro se*, filed a complaint
21 asserting violations of the Truth in Lending Act ("TILA"), the Fair Debt Collection Practices Act
22 ("FDCPA"), and the Real Estate Settlement Procedures Act and its implementing Regulation X
23 (jointly "RESPA") by Defendants Bank of America, N.A., Countrywide Home Loans Servicing
24 LP, Mortgage Electronic Registration Systems, Inc., and ReconTrust Company, N.A. [Doc. No.
25 1.] On May 23, 2012, Defendants moved to dismiss. [Doc. No. 8.] No opposition has been filed.

26 **LEGAL STANDARD**

27 Under Federal Rule of Civil Procedure 8(a)(2), "a complaint must contain sufficient factual
28 matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,

1 556 U.S. 662, 677-78 (2009). Motions to dismiss pursuant to Federal Rule of Civil Procedure
2 12(b)(6) test the sufficiency of this required showing. *New Mexico State Investment Council v.*
3 *Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). “Dismissal is proper when the
4 complaint does not make out a cognizable legal theory or does not allege sufficient facts to support
5 a cognizable legal theory.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir.
6 2011). And though *pro se* complaints enjoy “the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d
7 338, 342 (9th Cir. 2010), Rule 8 still “demands more than an unadorned, the-defendant-
8 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678.

9 DISCUSSION

10 Even affording every benefit of the doubt, Plaintiff’s complaint amounts to unadorned
11 accusation. Few facts are pled and next no attempt is made to explain how Defendants purportedly
12 violated any of the array of statutes cursorily invoked. Nor is any harm alleged, let alone
13 attributed to any conduct by Defendants. As such, the complaint fails to allege sufficient facts to
14 support any cognizable legal theory. Therefore, to the extent and for the additional reasons
15 specified below, Defendants’ motion to dismiss is **GRANTED**.

16 1. Claims Premised on TILA

17 Because Plaintiff references TILA as a basis for his claims, but fails to specify any
18 particular requirement or violation thereof, [*see* Doc. No. 1 at 2], the Court liberally construes the
19 complaint as asserting claims for both damages and rescission. [*See* 15 U.S.C. §§ 1635, 1640.]
20 Both claims are barred by applicable statutes of limitation and repose.

21 TILA damages claims are subject to a one-year statute of limitation that may, under certain
22 circumstances, be equitably tolled. *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). TILA
23 rescission claims are subject to a three-year statute of repose, which constitutes an absolute bar and
24 thus to which equitable tolling is unavailable. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412
25 (1998). Both statutes run from the date the subject loan was consummated. *See King*, 784 F.2d at
26 915; *see also McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012).

27 Plaintiff’s complaint was filed on March 6, 2012, nearly six years after the date the subject
28 loan was allegedly consummated, [Doc. No. 1 at 3 (“On or about August 1st, 2006 . . .”)], and no

basis for equitable tolling has been pled. *See Cervantes*, 656 F.3d at 1045 (equitable tolling only available “in situations where, despite all due diligence, the party . . . is unable to obtain vital information bearing on the existence of the claim”). Plaintiff’s TILA claims are thus untimely and barred. *See King*, 784 F.2d at 915. Because amendment could potentially provide a basis for equitable tolling of the statute of limitations, Plaintiff’s TILA claims for damages are **DISMISSED WITHOUT PREJUDICE**. But as the statute of repose is an absolute bar, and amendment would thus be futile, Plaintiff’s TILA claims for rescission are **DISMISSED WITH PREJUDICE**.

2. Claims Premised on the FDCPA

Plaintiff also invokes the FDCPA. [Doc. No. 1 at 2.] “To be liable for a violation of the FDCPA, the defendant[s] must - as a threshold requirement - fall within the Act’s definition of ‘debt collector.’” *Katz v. Aurora Loan Services, LLC*, 2012 WL 78399, at *2 (S.D. Cal. Jan. 10, 2012) (quoting *Izenberg v. ETS Servs., LLC*, 589 F.Supp.2d 1193, 1198-99 (C.D. Cal. 2008)). “[M]ortgage servicing companies and trustee fiduciaries[] are not “debt collectors” subject to the FDCPA.” *Khast v. Washington Mut. Bank*, 2011 WL 940792, at *3 (S.D. Cal. March 16, 2011); *see also Lal v. Am. Home Serv., Inc.*, 680 F.Supp.2d 1218, 1224 (E.D. Cal. 2010) (“The law is well settled that FDCPA’s definition of debt collector does not include the consumer’s creditors, a mortgage servicing company, or any assignee of the debt.”); *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178, 1182 (D. Ariz. 2009) (“[M]ortgagees and their assignees, servicing companies, and trustee fiduciaries are not included in the definition of ‘debt collector.’”). Nor does the term “include any person who collects . . . debt which . . . ‘was not in default at the time it was obtained by such person.’” *Katz*, 2012 WL 78399, at *2 (quoting 15 U.S.C. § 1692a(6)(F)(ii), (iii)).

Here, it remains uncontested that Defendants are variously mortgage servicers, trustee fiduciaries, and assignees of debt. *See, e.g.*, MTD at 7-8. Thus, Defendants do not qualify as “debt collectors” under the FDCPA. *Khast*, 2011 WL 940792, at *3. Moreover, Plaintiff fails to allege any debt that was ever in default, much less at the time it was assigned to or otherwise obtained by any Defendant. As such, Plaintiff fails to sufficiently allege Defendants’ status as debt

collectors and thus fails to state a claim premised on the FDCPA. *See Khast*, 2011 WL 940792, at

*3. Still, as amendment is not necessarily futile, Plaintiff's FDCPA claims are **DISMISSED**

WITHOUT PREJUDICE.

3. Claims Premised on RESPA

RESPA is also invoked. [Doc. No. 1 at 2.] Claims under RESPA require allegations of either actual damages or a pattern or practice of noncompliance supporting statutory damages. 12 U.S.C. 2605(f)(1); *accord Sitanggang v. Countrywide Home Loans, Inc.*, 419 Fed. Appx. 756, 757 (9th Cir. 2011). Neither is alleged here. Indeed, no mention of any harm or pattern is even alluded to in the complaint. Thus Plaintiff has failed to state any RESPA claim. *See Espinoza v.*

Recontrust Co., N.A., 2010 WL 2775753, at *4 (S.D. Cal. July 13, 2010). But as the Court cannot

say amendment would necessarily be futile, Plaintiff's RESPA claims are **DISMISSED**

WITHOUT PREJUDICE.

4. Claims Premised on Fraud

Plaintiff also makes passing reference to "fraud," and thus to afford every benefit of the doubt, the Court construes that reference as an allegation of fraud under California state law. [Doc. No. 1 at 2.] To state a claim for fraud under California law, Plaintiffs must plead: (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. *Gil v. Bank of Am., N.A.*, 138 Cal.App.4th 1371 (2006). Here, in federal court, allegations of fraud are subject to the particularity requirements of Federal Rule of Civil Procedure 9(b); "the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981) (citations omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." (citation omitted)).

Even most liberally construed, Plaintiff puts forth no allegations demonstrating any misrepresentation, Defendants' respective states of mind, justifiable reliance, or resulting damage.

[*See* Doc. No. 1.] Plaintiff thus fails to state a claim for fraud. *See Quitaro Family Trust v.*

1 *OneWest Bank, F.S.B.*, 2010 WL 392312, at *11 (S.D. Cal. Jan. 27, 2010). Again, because
2 amendment is not necessarily futile, Plaintiff's claims premised on fraud are **DISMISSED**
3 **WITHOUT PREJUDICE**.

4 **5. Claim for Declaratory Relief**


5 The complaint also refers to declaratory relief, and the Court liberally construes this
6 reference as a separate claim. [See Doc. 1 at 2.] Claims for declaratory relief may be dismissed
7 "where the substantive suit would resolve the issues raised by the declaratory judgment action."
8 *Fimbres v. Chapel Mortg. Corp.*, 2009 WL 4163332 at *5 (S.D. Cal. Nov. 20, 2009) (internal
9 quotation omitted). Here the complaint fails to explain how or what declaratory relief would
10 address or provide beyond the relief requested pursuant to the substantive claims. [See Doc. No.
11 1.] Nor how a declaratory judgment would in any way resolve uncertainties aside from those that
12 appear to constitute Plaintiff's substantive claims. [*Id.*] Plaintiff's claim for declaratory relief is
13 thus **DISMISSED WITHOUT PREJUDICE**.

14 **CONCLUSION**

15 For the foregoing reasons, Plaintiff's claims premised on fraud, RESPA, the FDCPA, for
16 declaratory relief, and for damages under TILA are **DISMISSED WITHOUT PREJUDICE**.
17 Plaintiff's claims for rescission under TILA are **DISMISSED WITH PREJUDICE**. Plaintiff is
18 granted leave to file a first amended complaint no later 21 days after the filing of this order.

19 **IT IS SO ORDERED.**

20 **DATED:** July 17, 2012

21 
22 **IRMA E. GONZALEZ**
23 **United States District Judge**
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